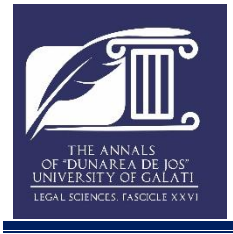

Contractual Risk and the "Risk of Loss", which Depends "On a Future and Uncertain Event"

Natalia-Veronica STOICA[1]

Alina-Elena ILIESCU[2]

Abstract: *The conclusion of any contract entails, to a greater or lesser extent, that the contracting parties assume certain risks – whether such risks are intentionally introduced into the legal structure by the parties themselves or arise and produce effects independently of their will. This makes it necessary to distinguish between different types of risk, including those intrinsic to certain contractual categories and others that are merely similar. As the very name suggests, aleatory contracts inherently involve the element of hazard (alea), which forms part of their legal cause. In such contracts, each party assumes both the risk of a loss and the possibility of a gain. When classifying contracts based on whether they are subject to conditions, aleatory contracts are considered inseparable from modalities – specifically from terms and conditions. However, hazard (alea) goes beyond a mere condition or term. Moreover, it is essential to distinguish between the general risk of the contract and the aleatory element specific to the contractual category being examined – especially in terms of their source and the effects they individually produce.*

Keywords: *aleatory contract; alea; fortuitous impossibility of performance; term; condition*

a. Aleatory Contracts and Their Legal Classification

Aleatory contracts do not benefit from a general legal regime under Romanian civil law. The Civil Code offers only a limited framework: a definition of these contracts (Article 1173(2)) and a rule regarding the inadmissibility of lesion (Article 1229). Additional rules appear within the regulation of special contracts—such as those for insurance, life annuities,

[1] Professor, PhD, Bucharest Academy of Economic Studies, Romania, Address: Piaţa Romană 6, Bucharest 010374, Romania, Corresponding author: verostoica@yahoo.com.
[2] PhD in progress, Bucharest Academy of Economic Studies, Romania, Address: Piaţa Romană 6, Bucharest 010374, Romania, E-mail: alissia_iliescu@yahoo.com.

care contracts, gaming or wagering, and some types of sales. Doctrine also identifies examples such as the sale of a life usufruct, a future good, or a litigious right (Boroi & Anghelescu, 2021, p. 129).

Prima facie, these contracts are onerous in nature—that is, they involve mutual obligations. Notably, in Romanian law, the life annuity and care contracts are onerous by nature, and when this is the case, they are aleatory by essence.

The scope or even existence of obligations—and hence of the parties' specific duties—depends on a future and uncertain event. For example:

In an insurance contract (Art. 2199 Civil Code), performance depends on the occurrence of the insured risk; in personal insurance, this could involve the death of an insured person (Art. 2227).

In life annuity or care contracts, performance is tied to an uncertain term—typically the life span of the beneficiary. In the case of care contracts, the monetary value of care may also fluctuate (Moțiu, 2017, p. 351) due to factors beyond the parties' control (Marcusohn, 2018, p. 371).

In games or wagers, the outcome depends on chance or the skills, strength, or ability of a person (Stănciulescu, 2017, p. 526).

Thus, the uncertainty of both gain and loss—shared and reciprocal—is a defining trait of aleatory contracts.

Case in Point: The Care Contract

Among these special contracts, the care contract stands out. Its principal aleatory element is the lifespan of the care recipient (Court of Appeal of Bucharest, Civil Section IV, Decision No. 141/2022). This remains true even when the contract includes a fixed term (Berindei, 2017, p. 766), since the beneficiary may pass away before the term's expiry—leading to the automatic termination of the contract.

This principle is confirmed by Article 2257(3) of the Civil Code, which obliges the care provider to arrange and cover the funeral costs if the beneficiary dies during the execution of the contract, regardless of whether it was for a fixed period or for life (Beleniuc, 2017).

Alea as Legal Cause and a Condition of Validity

The existence of hazard (alea) not only influences but actually constitutes the cause of aleatory contracts. If alea is missing, the contract is either:

Relatively null, or

Reclassified as a different contract, thus producing different legal effects under Article 1238(1) of the Civil Code.

Scholars (Ungureanu & Toader, 2022, p. 234) illustrate such lack of cause through examples like:

The civil fruits (revenues) generated by the transferred asset exceeding the care obligations, or The complete absence of risk, undermining the essence of aleatory nature.

Starting from the definition of cause as per Article 1235 of the Civil Code, one may affirm that in an insurance contract, the cause consists in the exchange of insurance premiums for the insurance indemnity, payable upon the occurrence of the insured risk. This risk represents a future and uncertain event, but always one that is possible (Stănciulescu, 2017, pp. 471–473).

In life annuity contracts and onerous care contracts, the cause is the exchange of a capital sum for periodic rent payments, or for care-related services—such as food, clothing, shelter, assistance, and, under certain conditions, funeral expenses.

For gaming or wager contracts, the cause typically involves the exchange of a sum of money for another sum, contingent on the occurrence of an event dependent on chance or on the qualities or abilities of the parties.

Generally, if the services exchanged deviate from those legally associated with a given contract, the contract's legal nature changes. For example, when a creditor of annuity (credirestraint) seeks, through a life annuity, to secure income for self-maintenance, and the primary aim is to receive money, not to ensure care, the contract is not one of care. The use of money for personal maintenance is incidental. In contrast, in a care contract, the essence lies in the debtor's personal and continuous delivery of essential services, relieving the creditor from providing for themselves (Iliescu, 2025).

b. Alea, Condition, or Term? Conceptual Delineations

Doctrine (Pop, 2009, p. 108) suggests that alea—an uncertain event—can be regarded as a condition or an uncertain term, which might imply their conceptual identity.

However, alea can have a more complex structure than a simple condition or term. In a care contract, for instance, alea includes both a temporal element and the uncertainty of evolving needs of the beneficiary, which may change at any time during the contract's performance.

Regarding conditions, a modality of civil legal acts, Article 1399 of the Civil Code defines them as future and uncertain events on which the effectiveness or termination of an obligation depends. A suspensive condition triggers the legal effects, while a resolutory condition, once fulfilled, nullifies them (Articles 1400 and 1401). A casual condition is one where the event's occurrence is independent of the parties' will and governed by chance (Ungureanu & Toader, 2022, p. 249). Nevertheless, one cannot equate alea in aleatory contracts with resolutory casual conditions, despite structural similarities.

As for terms, another modality of civil legal acts, Article 1411 of the Civil Code defines them as future and certain events that affect the onset or cessation of legal effects. Terms may be certain or uncertain, suspensive or extinctive.

Indeed, a life annuity contract involves an uncertain extinctive term, and a care contract may have a certain or uncertain extinctive term depending on whether it's for a defined period or for life. However, regardless of the term's nature, these contracts are constantly under the specter of the beneficiary's death, which leads to their termination.

Similarly, insurance and wagering contracts may involve certain or uncertain terms, but the element of risk surpasses mere temporality

Alea: A Structural Element, Not a Mere Modality

Beyond the fact that alea in aleatory contracts represents an element tied to their cause—and thus impacts their validity—the condition and the term are merely modalities affecting the obligations arising from the contract, not the contract itself. The condition determines the effectiveness or extinction of the

obligations, but does not affect the contract in its entirety. As such, these obligations are defined in terms of existence and are determined or determinable in scope from the moment the contract is concluded—something that does not characterize aleatory contracts.

Indeed, by definition, a condition presumes the existence of a legal obligation with a determined content, making it an accessory clause specific to commutative contracts (Chirică, 2017).

In contrast, in aleatory contracts, it is alea that determines the extent or even existence of the rights of one or both parties, along with their corresponding obligations. These elements cannot be pre-established at the moment of contract formation. The aleatory element is essential, inseparable from the very identity of these contracts.

Irrevocability and Interdependence of Alea

Article 1406 of the Civil Code allows a party to waive a condition that was stipulated for their benefit, transforming the obligation into a pure and simple one. However, such a transformation is inconceivable in aleatory contracts, where alea applies simultaneously and reciprocally to both parties.

Compare, for instance, the onerous care contract with a sales contract:

In the latter, once a resolutory condition is fulfilled, ownership reverts to the transferor.

In the former, there is no retroactive effect—the debtor of care retains the acquired right.

Moreover, while in the care contract the value of services rendered can only be determined after the beneficiary's death, in a sales contract, the price is known upfront, unless it is to be determined later using clear contractual criteria, which must be stipulated.

Reducing the death of the care recipient to a mere uncertain term would strip it of its role as an essential element of validity in the care contract. It forms part of the contract's causal ensemble, mutually assumed by both parties. The duration of life influences who ultimately "loses" or "wins" in terms of contract execution.

Even a certain term, such as a fixed end date, extinguishes the obligation for care and the corresponding right, but like the condition, it is a core element integrated into the contract's cause. The distribution of benefits and losses also depends on the term's fulfillment and the evolving needs of the beneficiary. Thus, it does not act as a mere extinctive term, but becomes part of the contract's causal structure.

Any attempt to equate condition and term is therefore conceptually untenable—one is an uncertain future event, the other a certain one (Iliescu, 2025).

Alea Is Not a Condition in Disguise

Furthermore, the aleatory element cannot be treated as a condition because its occurrence does not govern the effectiveness or dissolution of the obligation. And unlike a condition, which must be a single event, alea may consist of a succession of events, such as in care contracts where:

Support needs may emerge at intervals;

Care requirements may increase in quantity or intensity over time, as the beneficiary ages or their health deteriorates (Iliescu, 2025).

Ultimately, while alea may vary in degree of unpredictability, it remains a structural determinant of the contract. It is not an accessory—but the engine that propels the very nature of aleatory arrangements.

c. The Concept of Risk Is Undoubtedly Linked to That of Loss

Whether we speak of the risk of perishing goods, risk due to fortuitous impossibility of performance, contractual risk, or the risk voluntarily assumed by parties in aleatory contracts—these are all legal faces of risk. However, this analysis focuses on the latter two: the risk inherent in aleatory contracts versus the risk stemming from the fortuitous impossibility of performance in reciprocal, interdependent obligations characteristic of synallagmatic contracts.

Contractual Risk and Fortuitous Impossibility

Contractual risk arises when one of the obligations, which was possible at the time of contract conclusion, becomes impossible to perform due to a fortuitous event—occurring either before performance begins or during its

execution. This impossibility must result from a case of force majeure or fortuitous event, entirely independent of the parties' will (Ilie, 2011, p. 52; Pop, 2009, p. 765; Stătescu & Bîrsan, 2008, p. 93).

This type of risk is specific to synallagmatic contracts, requiring an assessment of which party bears the consequences. It is governed by Article 1557 of the Civil Code, distinct from Article 1634, which regulates fortuitous impossibility of obligation in general. The distinction lies in the reciprocity and interdependence of obligations in synallagmatic contracts.

As a result:

If impossibility is permanent, the contract is terminated;

If temporary, the other party's obligation is suspended.

Assignment of Risk

The risk falls on the debtor of the impossible obligation, unless: The impossibility is temporary and the creditor suspends their own obligations.

If the creditor has already performed, the debtor must return what was received, as per Articles 1557(1) and 1635(1) Civil Code. The contract will be retroactively terminated, and no damages may be claimed—because the non-performance is not culpable but fortuitous (Popa, 2020, p. 276).

However, if the creditor was in default, they bear the risk.

When the creditor opts to suspend their own obligations due to a temporary impossibility, the contract remains in force and will resume once the cause of impossibility ceases (Pop, 2006, p. 564).

Risk in Contracts Conveying Ownership

In contracts for the transfer of ownership, if the debtor of the obligation to deliver the good is prevented from doing so by a fortuitous event or force majeure, the rule is that this debtor bears the risk—unless:

- The parties agreed otherwise, or
- The creditor was in default.

In such cases, the contract is terminated, and the debtor cannot demand counter-performance. If they had already received performance, they must return it.

Naturally, in synallagmatic ownership-transfer contracts, it is also possible that the fortuitous impossibility affects the other party's obligation as well—not just the delivery of the good.

d. Distinction Between Contractual Risk and Aleatory Risk

Both contractual risk and the risk of loss in aleatory contracts stem from external elements, but the former is unrelated to the will of the contracting parties, whereas the latter is an element intentionally contemplated by the parties at the time of the contract's conclusion (Borş, 2021).

Although both types of risk impact the contract and the legal obligations arising from it (Borş, 2021), contractual risk arises from an event whose occurrence is uncertain at the time of the contract and is typically not foreseen by the parties. In contrast, the risk of loss in aleatory contracts is not foreign to the will of the parties—it is precisely what drives their intention to contract, being integrated into the contract's valid cause.

Thus:

Contractual risk is a consequence of a future event that is, in principle, irrelevant to the contractual construction;

Aleatory risk arises from a future event whose effects are deliberately and equally assumed by both parties.

In the first case, the event cannot be identified at the moment of agreement, while in the second case, the parties know, anticipate, and incorporate it into the contractual framework (Iliescu, 2025).

Contractual risk is determined by an event completely beyond the parties' will, which they cannot foresee or prevent—be it a fortuitous event, force majeure, or an equivalent occurrence (Popa, 2020, p. 274). By contrast, the events that define aleatory contractual risk may be:

Evident, like the death of a person, or

Foreseen at the time of contracting—though uncertain in occurrence (Borş, 2021).

While contractual risk typically results in the fortuitous impossibility of performing a key obligation and leads to the legal dissolution of the contract

due to the frustration of purpose, the risk in aleatory contracts entails the occurrence of one or more events that lead to a value imbalance between performances—yet, the contract endures, executed within a fluctuating framework (Iliescu, 2025).

e. Alea as a Validity Element of Aleatory Contracts

In all circumstances, alea constitutes a validity element for aleatory contracts. It is an integral part of the contract's cause, establishing the balance between the chance of gain and the risk of loss, which belongs equally to both parties. In the absence of this balance—i.e., in the presence of a predetermined equivalence of reciprocal performances—the contract no longer qualifies as aleatory, but rather becomes commutative.

Therefore, alea should not be confused with the general uncertainty that may affect any contract due to circumstances arising after its conclusion, which are unrelated to the defining elements the parties contemplated at the time of contract formation.

In commutative contracts, each party's obligation represents the cause for which the other undertakes theirs. However, in aleatory contracts, the reciprocal obligations are fundamentally tied to the existence of the aleatory element, with the determination of the "winner" and "loser" deferred to a future moment.

Here, the parties expressly agree that the result may not be balanced; thus, the equilibrium concerns not the value of the performances, but rather the shared assumption of risk. As such, the monetary equivalence of obligations is not part of the parties' expressed intent.

f. Final Considerations

In conclusion, for all aleatory contracts, alea is more than just a condition or a term—which are contractual modalities based on future events, whether certain or uncertain. Nor is it a subsequent cause disrupting contractual balance. Rather, alea is part of the very cause of the contract and forms an essential element in the process of shaping and expressing the parties' juridical intent.

Bibliography

Beleniuc, G.-V. (2017). *Contractul de întreținere. Caractere juridice/ Maintenance contract. Legal characteristics*. Bucharest: Universul Juridic, 11. https://lege5.ro/App/Document/gi3dcnjxgqyq/.

Berindei, M.-G. (2017). *Contractul de întreținere. Noul Cod civil. Studii şi comentarii. Volumul III. Partea a II-a. Cartea a V-a (art. 1650-2499). Contracte speciale. Garanții/ Maintenance contract. New Civil Code. Studies and commentaries. Volume III. Part II. Book V (art. 1650-2499). Special contracts. Guarantees* (Ed. Coord. Uliescu, M.). Bucharest: Universul Juridic, pp. 761-787.

Boroi, G. & Anghelescu C.-Al. (2021). *Curs de drept civil. Partea generală /Civil law course. General part (3rd edition revised and added).* Bucharest: Hamangiu.

Borş, O.-L. (2021). *Contractul de întreținere. Riscul în contracte şi contractele aleatorii/ Maintenance contract. Risk in contracts and random contracts*. Bucharest: Universul Juridic, 5. https://lege5.ro/App/Document/g4ytmnbzga4q/.

Chirică, D. (2017). Categoria contractelor aleatorii. Liber Amicorum Liviu Pop. Reforma dreptului privat român ân contextul federalismului juridic european. Bucharest: Universul Juridic, pp. 153-167.

Curtea de Apel Bucureşti, secţia a IV-a civilă, decizia nr. 141/2022/Bucharest Court of Appeal, 4th civil section, decision no. 141/2022, available at https://lege5.ro/App/Hotarare/giydambqgaydanbsgazdsmzv/.

Ilie, G.A. (2011). Regula res perit domino în materie contractuală între mit şi realitate/ The res perit domino rule in contractual matters between myth and reality. *Revista română de drept privat/Romanian Private Law Journal,* 2, pp. 52-129.

Iliescu, A.-E. (2025). *Contractul de întreținere (teză de doctorat)/Maintenance contract (doctoral thesis).* Bucharest: Academia de Studii Economice din Bucureşti.

Marcusohn, V. (2018). *Drept civil. Contacte speciale/Civil law. Special contacts*. Bucharest: Universul Juridic.

Moţiu, Fl. (2017). *Contracte speciale/Special Contracts* (7th edition, revised and added). Bucharest: Universul Juridic.

Pop, L. (2006). *Tratat de drept civil. Obligațiile. Volumul I. Regimul juridic general sau Ființa obligațiilor civile/ Civil Law Treatise. Obligations. Volume I. The General Legal Regime or the Essence of Civil Obligations*. Bucharest: C.H. Beck.

Pop, L. (2009). *Tratat de drept civil. Obligațiile. Volumul II. Contractul/ Civil law treaty. Obligations. Volume II. The contract*. Bucharest: Universul Juridic.

Popa, I.-Fl. (2020). *Contractul civil. Drept civil. Obligaţiile/Civil contract. Civil law. Obligations* (Pop, L., Popa, I.-Fl. & Vidu, S.-I., 2nd edition, revised and added). Bucharest: Universul Juridic, pp. 31-278.

Stănciulescu, L. (2017). *Dreptul contractelor civile. Doctrină şi jurisprudenţă/ Civil Contract Law. Doctrine and Jurisprudence.* 3rd edition. Bucharest: Hamangiu.

Stătescu, C. & Bîrsan, C. (2008). *Drept civil. Teoria generală a obligaţiilor/Civil law. General theory of obligations*. 9th revised and expanded edition. Bucharest: Hamangiu.

Ungureanu, C.T. &, Toader, I.-Al. (2022). *Drept civil. Partea generală. Persoanele/ Civil law. General part. Persons.* 5th Ed. Bucharest: Hamangiu.